could have been, but the prayer in the statement of claim read with paragraph 3 of the reply amount, in my view, to a claim for an order for specific performance and for an order fixing the current rent. For the reasons already set out in this judgment, I would grant a decree for specific performance of the original agreement.

So far as fixing the current rent is concerned, these proceedings have gone astray. When the trial judge inspected the premises, he obtained information, apparently from persons outside the proceedings, and, in consequence, suggested to the parties that $715 was a fair rent. When the hearing was resumed, the plaintiff accepted this as a fair rent and closed his case. Whether it was these happenings that caused no evidence to be given on this issue other than that given by the appellant, I do not know, but it is obvious that there has been no proper trial of the issue. I would, therefore, refer this issue back to the court below to take such steps, in the event of the parties failing to agree on the current rent, as are necessary to enable the court to try this issue and determine what the current rent should be, having regard to the provision for variation of the rent set out in the agreement.

I would like to repeat what I have said previously about the desirability of the parties agreeing to an expanded provision in regard to the variation of rent. In the meantime, however, and failing such agreement, the sublease must follow the terms of the agreement signed between the parties and provide for a monthly rental of $650, with the provision for variation set out in the agreement.

Accordingly, I would allow this appeal with costs to the appellant, set aside the judgment of the court below, grant an order for specific performance of the original agreement and order a new trial on the question of what variation there should be in the rent of $650. The appellant should also have his costs of the proceedings to date in the court below.

Wee Chong Jin C.J. (Singapore) concurred.

Appeal allowed.

KIAN SENG & CO. v. BAN HIN LEE BANK LTD. & ORS.

[O.C.J. (Tan Ah Tah F.J.) February 12, 1964]

[Singapore — Suit No. 49 of 1960]

Landlord and Tenant—Oral tenancy—Tenancy of middle portion of building—Access to public road through adjacent owners' land—Blocking up of access—Whether right of way existed through front portion of building—Implied term in tenancy—Way of necessity.

The 1st defendants were the owners of the premises in question. The front portion of the premises was occupied by the 2nd defendants as a store and they had direct access to the public road. The plaintiffs who had entered into an oral tenancy agreement with the 1st defendants occupied the middle portion of the premises. The rear portion of the said premises was occupied by one LWP. Both the plaintiffs and LWP obtained access to their respective portions by means of a path which ran along the side of the premises. There were side doors in the middle and rear portions of the store which opened on to the path. In 1958 the City Council (who owned the land of which the path formed a part) blocked up the side doors. This completely deprived the plaintiffs of their means of access. The plaintiffs now sought a declaration that they had a right of way over the front portion of the building occupied by the 2nd defendants.

Held: in the circumstances of this case a term should be implied in the oral tenancy that the plaintiffs were to remain tenants of the 1st defendants so long as they could have access to the middle portion of the building by the path and through the side door. Accordingly the plaintiffs claim fails.

Observation on the law where such a term could not be implied.

Cases referred to:—

(1) *Dahl* v. *Nelson, Donkin & Co.* (1880), 6 App. Case 38.

(2) *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206.

(3) *Barry* v. *Haseldine* [1952] 1 Ch. 835 at p. 839.

ACTION.

L. Rayner for the plaintiffs.

A. P. Godwin for the 1st defendants.

R. Ramason for the 2nd defendants.

Cur. Adv. Vult.

Tan Ah Tah F.J.: In this action the plaintiffs ask for a declaration that they are entitled to a right of way over premises or land belonging to the first defendants. There are also claims for special damages and general damages.

The building with which this litigation is concerned is known as No. 18 North Boat Quay, Singapore. It is divided into three portions which for the sake of convenience will be referred to as the front portion, the middle portion and the rear portion.

On the 16th July 1956 Chua Lian Teng, a partner in the plaintiff firm, went to see Yeap Lean Seng of the first defendant bank with a view to renting the middle portion. After a brief conversation, Chua Lian Teng was given a key and went to inspect the premises. After he had inspected the premises he went back to see Yeap Lean Seng. The rent was thereupon agreed at the sum of $100 per mensem. Chua Lian Teng paid the first month's rent and was given a receipt. He informed Yeap Lean Seng that he wanted to use the place as a store. There was no discussion regarding the terms of the tenancy beyond the fixing of the rent at $100 per mensem. No tenancy agreement was drawn up.

When the plaintiffs went into possession of the middle portion, both the front and rear portions were already being used as stores by different businesses. The front portion was occupied by the second defendants while the rear portion was used as a store for charcoal by one Lau Woo Phuan, a charcoal dealer.

The second defendants who occupied the front portion naturally had direct access to the road called North Boat Quay which went past the front of the premises. As for the plaintiffs and Lau Woo Phuan, they obtained access to their respective stores by means of a path which ran along the side of the premises. There were side doors in the middle and rear portions which opened on to the path. By these means the plaintiffs and Lau Woo Phuan were able to move goods into and out of their stores.

In 1958 the City Council were the owners of the land of which the path formed a part. This land extended right up to the side of No. 18 North Boat Quay. On the 8th July 1958, after issuing due warning to all concerned, the City Council blocked up the side doors. This action on the part of the City Council completely deprived the plaintiffs of the means of access which they had hitherto enjoyed to their store.

The plaintiffs now contend, *inter alia*, that they have a right of way over the front portion of the building and they have brought this action to establish that right. The exercise of such a right of way would of course involve the passing and re-passing by the plaintiffs and their servants through the second defendants' store. Toh Kia Song, the second defendants' managing partner, stated in evidence that he kept his store locked up when he was not removing goods from it. He also stated that the store would become virtually useless if other people had a right of way through it. In my view, if they had thought about it, both Chua Lian Teng and Yeap Lean Seng, who are men of experience in the world of business, would have appreciated Toh Kia Song's point of view and would have agreed that practically all business men in the position of Toh Kia Song would have found it extremely inconvenient to have other persons enjoying a right of way through their store.

In this connection it becomes necessary to refer to the law relating to implied terms in contracts. One well-known statement on this subject is to be found in *Dahl* v. *Nelson, Donkin & Co.*[1] where Lord Watson said (at p. 59) :—

> "I have always understood that, when the parties to a mercantile contract such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

In *Shirlaw* v. *Southern Foundries (1926) Ltd.*,[2] MacKinnon L.J. stated the law as follows (at p. 227) :—

> "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!' "

It is in my opinion clear that if the test laid down by MacKinnon L.J. is applied to the circumstances of this case, a term should be implied in the oral tenancy agreement that the plaintiffs were to remain tenants of the first defendants so long as they could have access to the middle portion of the building by the path and through the side door. This means that the plaintiffs' claim must fail.

However, for the sake of completeness, I must now deal with the case on the basis that the term to which I have just referred cannot be implied in the agreement. As there is no clearly defined way through the second defendants' store, the plaintiffs must show that they are entitled to a way of necessity. In considering this matter it is important to remember that the first defendants were at all material times the owners of the whole building and therefore of the three portions into which it was divided. A way of necessity arises where land which is entirely surrounded by other land is segregated by the common owner, and either retained by him or leased to another person. In such a case a way of necessity is implied both in favour of the common owner and against him. In the present case it does not matter which of the portions of the building was let first by the first defendants.

Prior to the blocking up of the side doors, the plaintiffs enjoyed a permissive method of approach to their store along the path which belonged to the City Council. In my opinion, when this mode of access was cut off, the plaintiffs would have been entitled to enjoy the way of necessity which they originally acquired when the middle portion of the building was let to them. On this point it is relevant to refer to the following passage in the judgment of Danckwerts J. in *Barry* v. *Hasseldine* [3] at p. 839 :—

> "In my opinion, however, if the grantee has no access to the property which is sold and conveyed to him except

over the grantor's land or over the land of some other person or persons whom he cannot compel to give him any legal right of way, common sense demands that a way of necessity should be implied, so as to confer on the grantee a right of way, for the purposes for which the land is conveyed, over the land of the grantor; and it is no answer to say that a permissive method of approach was in fact enjoyed, at the time of the grant, over the land of some person other than the grantor because that permissive method of approach may be determined on the following day, thereby leaving the grantee with no lawful method of approaching the land which he has purchased."

It should be added that in order to determine whether a way of necessity has arisen the law to be applied is the same whether it is a case of a sale or a lease of land.

The vast majority of landlords and tenants in Singapore would be extremely surprised to know that by reason of operation of law, other persons may be able to enjoy a way of necessity through stores or other portions of buildings occupied by tenants, and that landlords and tenants are liable to be sued if such a way of necessity is not provided. This affords another reason for my view that an implied term must be read into the tenancy agreement between the plaintiffs and the first defendants.

If the plaintiffs had succeeded in their claim I would have made the declaration asked for by them and an order that both defendants should provide a right of way so as to enable them to have access to their store. I would not have made any award for special damages as it is obvious that, on receiving due warning of the proposal to block up the side doors, the plaintiffs should have removed their goods from the store. As to general damages, I would have awarded the sum of $3,000 against the first defendants, and the sum of $500 against the second defendants.

However, for the reasons which I have stated, the plaintiffs' claim must fail and there will be judgment for both defendants with costs.

Judgment for the defendants.

Solicitors: *L. Rayner*; *Donaldson & Burkinshaw*; *R. Ramason.*

LEONG CHEK PONG & ANOR. v. LEE CHICK YET

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) & Wylie C.J. (Borneo)) March 9, 1964]

[K.L. — Federal Court Civil Appeal No. 86 of 1963]

Contract — Oral and written contracts to mine land — Specific performance.

Specific relief — Enforcement of contract to mine land — Clause for renewal.

Mining — Tin — Use of hydraulic methods — Licence to use hydraulic methods not in possession of persons actually mining — Whether mining unlawful — Whether licence assignable — Mining Enactment (Cap. 147), ss. 90 and 91.

Mining Enactment (Cap. 147) — Discussion on.

The appellants brought an action against the respondent for specific performance of a written contract entered into by them under which the appellants were permitted to carry out mining operations on the respondent's land under a mining certificate issued to the respondent. The defence was that the appellants were not entitled to renewal of the contract, as expressly provided in the contract, by reason of having committed numerous breaches of the conditions of the agreement in connection with the working of the mine.

The evidence indicated that a licence to mine by hydraulic methods was issued to the respondent under section 91 of the Mining Enactment. The trial judge, however, held that as the appellants were working the mine they should have had such a licence issued to them and as they did not have one, they were committing a breach of the law as set out in section 90 of the enactment. He also found that certain breaches of the agreement had been committed by the appellants. In the event he dismissed the appellants' claim for specific performance. On appeal,

Held: (1) the requirement of section 90 of the Mining Enactment is not that the person who is physically working the mine should be in possession of a licence relating to employment of hydraulic methods. The requirements are that there should be in existence such a licence and the person working the mine should be doing so with the authority of the holder of the licence. This state of affairs existed in the instant case;

(2) there is no provision in the Mining Enactment prohibiting assignment of such a licence issued under section 91;

(3) on the facts there were no breaches of the agreement by the appellants;

(4) appellants were entitled to specific performance of the agreement.

Observations on local law relating to mines, p. 212.

Cases referred to:—

(1) *Archbolds Ltd.* v. *S. Spanglett Ltd.* [1961] 1 All E.R. 417, 424.

(2) *Snell* v. *Unity Finance Ltd.* [1963] 3 All E.R. 50.

(3) *Howell* v. *Falmouth Boat Construction Co. Ltd.* [1951] A.C. 837, 645.

(4) *Davies* v. *Makuna* 29 Ch. D. 596.

(5) *Woolfe* v. *Wexler* [1951] 2 K.B. 154.

(6) *Vita Food Products Incorporated* v. *Unus Shipping Co.* [1939] A.C. 277, 293.

(7) *Strongman (1945) Ltd.* v. *Lincock* [1955] 2 Q.B. 525.

(8) *Hart* v. *Hart* (1881) 18 Ch. D. 670, 685.

FEDERAL COURT.

E. K. Yeap (*Miss G. B. Yeap* with him) for the appellants.

R. H. V. Rintoul for respondent.

Cur Adv. Vult.

Thomson L.P.: This is an appeal from a decision of the High Court at Ipoh.

The respondent, who was the defendant in the original proceedings, is the proprietor of a